IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NOV 19 1980
MICHAEL RODAK, JR., CLE

NO. 79-1538

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET. AL.,
Appellees

NO. 79-1596

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.,
Appellants

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF APPELLANT-INTERVENORS

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QUESTIONS PRESENTED

1. Whether the requirement of Sections 515(d) and (e) of the Surface Mining Control and Reclamation Act of 1977 that surface mined land on steep slopes be returned to the approximate original contour violates the Tenth Amendment.

2. Whether Sections 515(d) and (e) and 522 of the Surface Mining Control and Reclamation Act of 1977 take private property without just compensation in violation of the Fifth Amendment.

3. Whether Sections 518, 521, and 525 of the Surface Mining Control and Reclamation Act of 1977, to the extent those sections provide for summary issuance of cessation orders and civil penalties, violate the procedural due process guarantee of the Fifth Amendment.

PLAINTIFFS

Virginia Surface Mining & Reclamation Association, Inc.

A & S Coal Company

Amos Ridge Coal Company

Bevins Mining Company, Inc.

Big Fork Coal Company

Bill's Branch Coal Company

Black Creek Coal Company

Bob's Branch Coal Company

Bossco, Inc.

Bradley Branch Coal Company

Brushy Ridge Coal Company

Buchanan & Sons

Burnrite Coal Company

Cabot Coal Corp.

Cardinal Mining Ltd.

Chaparal Mining Company, Inc.

Charles D. Dale Coal Company

Claude Yeary Coal Company

PLAINTIFFS, CONT'D

Conley Mullins Coal Company

Conway Coal Company

Copeland Coal Company

Curt's Coal Company

Deena Coal Company

Double D Coal Company

Elkins-Kendrick Enterprises

Five Oaks Coal Company

Flat Gap Mining Company

Gale Coal Company, Inc.

Genoa Coal Company, Inc.

G & O Coal Company

G & T Coal Company

H.B. Rowe & Company

H.C. Bostic Coal Company, Inc.

H.R.C. Coal Company, Inc.

Highland Enterprises

Hi Heat Coal Company

Horn Construction Company, Inc.

PLAINTIFFS, CONT'D

Humphreys Enterprises

J.B. Coal Company

Jil-Mar Coal Company, Inc.

Lyons Coal Company

Laurel Creek Coal Company

M & M Coal Company, Inc.

DEFENDANTS

Cecil D. Andrus, Secretary of the Interior

Town of St. Charles, Intervenor

Virginia Citizens For Better
Reclamation, Inc., Intervenor

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OPINIONS BELOW

The opinion of the district court on appeal here, as yet unreported, appears as Appendix D in the jurisdictional statement filed by the Appellant Secretary of the Interior in this case. Secretary's Jurisdictional Statement pp. 21A-75A. The amendment of this order appears as appendices A and B of the Secretary's Jurisdictional Statement. Secretary's Jurisdictional Statement pp. 1A-16A.

The opinion of the United States Court of Appeals for the Fourth Circuit, dissolving a preliminary injunction granted by the district court is reported at 604F. 2d 312 (1979) and appears as Appendix E in the Secretary's Jurisdictional Statement. Secretary's Jurisdictional Statement 76A-85A. The opinion of the district court at the preliminary injunction stage is not reported and appears in the Secretary's Jurisdictional Statement, Appendix F. Secretary's Jurisdictional Statement 86A-101A.

JURISDICTION

The final judgment of the district court was entered on January 3, 1980. An amending order was entered by the district court on January 21, 1980. The Virginia Citizens for Better Reclamation and the Town of St. Charles, Virginia filed their jurisdictional statement on March 15, 1980. This Court noted probable jurisdiction on October 6, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1252.

CONSTITUTIONAL PROVISIONS, STATUTES
and REGULATIONS:

U.S. Constitution, Amend. V

U.S. Constitution, Amend. X

The Surface Mining Control and Reclamation Act,

P.L. 95-87, 91 Stat 445, 30 U.S.C 1201 et.seq.

P.L. 95-87, §10(g), 30 U.S.C. 1201(g)

P.L. 95-87, §102(c), 30 U.S.C. 1201(c)

P.L. 95-87, §503, 30 U.S.C. 1253

P.L. 95-87, §515(d) and (e), 20 U.S.C. 1265(d) and (e)

P.L. 95-87, §518

P.L. 95-87, §521(a)(1)-(3)

P.L. 95-87, §522

P.L. 95-87, §525

STATEMENT

On August 3, 1977, Congress responded to public outcry against the abuses of inadequately controlled and regulated strip mining by passing the Surface Mining Control and Reclamation Act, P.L. 95-87, 91 Stat. 445, 30 U.S.C. 1201 et. seq. On October 23, 1978, the Virginia Surface Mining and Reclamation Association, Inc., sixty-three of the association's member coal companies, and four individual land owners filed suit in the United States District Court for the Western District of Virginia broadly challenging the constitutionality of the Act and praying that the Secretary of the Interior be enjoined from enforcing the Act in Virginia. The Commonwealth of Virginia and the Town of Wise, Virginia, in response to the complaints of the strip miners, intervened on behalf of the plaintiffs. The Virginia Citizens for Better Reclamation, Inc., and the Town of St. Charles, Virginia, concerned with the Commonwealth's history of condoning strip mine abuses, intervened in support of the Secretary's enforcement of the Act.

On February 14, 1979, after a hearing on plaintiff's motion for a preliminary injunction, the district court enjoined the Secretary from enforcing Sections 502 through 522 of the Act, pending final disposition of the plaintiffs' action on the merits. On August 10, 1979, this injunction was dissolved by the Fourth Circuit Court of Appeals. 604 F. 2d 312.

The district court continued its review of the volumes of evidence adduced in the thirteen day trial on the merits held while the Secretary's appeal to the preliminary injunction was pending. On January 3, 1980, the district court entered its final order declaring Sections 515 (d) and (e), 518, 521 (a)(1)-(3), 522 and 525 of the Act unconstitutional and permanently enjoining their enforcement. Responding to wide spread confusion in the coal industry concerning the ramifications of the decision, the district court coupled its denial of the Secretary's Motion for a Stay pending appeal with an order and an opinion clarifying its permanent order. This clarification was entered on January 21, 1979.

The Secretary, the Virginia Citizens for Better Reclamation, and the Town of St. Charles filed motions for a stay of the district court's order with the Chief Justice of this Court, sitting as Circuit Justice for the Fourth Circuit. On February 25, 1980, the Chief Justice signed an order staying the district court's order pending filing of a response by plaintiffs. This response and the motions for a stay were considered by the entire Court and, on March 17, 1980, this Court entered an order staying the judgment of the district court, pending the timely filing and disposition of the appeal.

SUMMARY OF ARGUMENT

I. THE REQUIREMENTS OF SECTIONS 515(d) AND (e) OF THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 CONCERNING RESTORATION TO THE APPROXIMATE ORIGINAL CONTOUR DO NOT VIOLATE THE TENTH AMENDMENT.

The district court reasoned that, if Congress set a nationally applicable standard for an industry and gave the individual states the choice of having that standard enforced by a state or federal agency, and a court determined that the standard placed an undue economic burden on a state, then the standard violated the Tenth Amendment as to that state. The Tenth Amendment, as construed in National League of Cities v. Usery 426 U.S. 833 (1976), does not lend itself to such an interpretation and even if it did, it would still permit the sections in question because they do not place undue economic burden on the Commonwealth of Virginia.

ARGUMENT

I. THE REQUIREMENTS OF SECTIONS 515(d) AND (e) OF THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 CONCERNING RESTORATION TO THE APPROXIMATE ORIGINAL CONTOUR DO NOT VIOLATE THE TENTH AMENDMENT.

A. The district court applied an impermissible standard of review.

Sections 515(d) and (e) of the Act, 30 U.S.C. 1265(d) and (e) are set out fully at pages 124A-127A in the Appendix to the Secretary's Jurisdictional Statement. Those Sections establish additional performance standards for surface mining on "steep slopes", as defined in Sections 515(d)(4):

> "Any slope above twenty degrees or such lesser slope as may be defined in view of particular geographic characteristics."

Those sections were found to violate the Tenth Amendment because the provision that surface-mined steep slopes be restored to the approximate original contour were, in the opinion of the district court,

> "...environmentally unsound and do not serve the interests of the federal government and are so burdensome on the Commonwealth of Virginia as to threaten its economy."

District Court clarifying and amending order, entered January 21, 1980. Secretary's Jurisdictional Statement, p. 1A.

The key issue presented to this Court in the appeal at hand is the meaning of National League of Cities v. Usery, 426 U.S. 833 (1976). The National League of Cities ruling that the Tenth Amendment prevented federal minimum wage and overtime standards from reaching the employees of states and subdivisions of states undeniably rejuvenated the Tenth Amendment as a limitation on the Congressional commerce power. Compare, Maryland v. Wirtz, 392 U.S. 183 (1968). The question in this case is the parameters of judicial review under that rejuvenated limitation. The language of National League of Cities instructs that the Tenth Amendment is relevant only when Congressional Action is:

> "Directed not to private citizens, but to the States as States."

426 U.S. at 845.

The Court began the analysis by addressing the issue of whether the Act was directed to private

citizens or "to the States as States". The district court found that:

> "While the Act ultimately affects the coal mine operator, its pervasive effect is on the state's legislative authority and on state control of land within its boundaries"

District Court Opinion, January 3, 1980. Secretary's Jurisdictional Statement, p. 32A.

That the Act's "pervasive effect is on the state's legislative authority" is irrelevant. The Act does not regulate the Commonwealth of Virginia or the state legislature, rather it establishes regulations applicable to surface coal mining operations in Virginia, as well as other states, and it offers the Commonwealth the opportunity to enforce these regulations.[1]

---

[1]Section 503 of the Act, 30 U.S.C. 1253 provides that any state desirous of assuming permanent regulatory authority over surface coal mining within its borders may do so by submission of an acceptable proposed program to the Secretary demonstrating that the state legislature has enacted laws implementing the environmental protection standards established by the federal statute and accompanying regulations and that the state has the administrative and technical ability to enforce those standards. Should

the Secretary disapprove of such a proposed program in accordance with the time schedules and procedures established in this section, the Secretary will implement a federal program regulating surface mining in that state.

When Congress chose to give the states the option of enforcing federal standards themselves or having those standards enforced by a federal agency, it did not mean those standards were, therefore, directed "to the States as States". Under the Tenth Amendment, there are three classes of powers: powers held by the United States, powers held by the States respectively, and powers held by the people. The United States did not lose the power to regulate interstate commerce simply by offering the respective states an opportunity to enforce that power within their borders. Cooley v. Board of Wardens of the Port of Philadelphia, 53 U.S. (12 How) 299 (1851).

The district court, after having determined that the regulations were directed to the "States as States", proceeded to weigh the interplay of federal and state interests involved:

> In considering the relief to be granted in a case like this, the state and federal governments' interests must be balanced. The approximate original contour requirement imposed by the Act is not environmentally sound and does not serve the conservation interests of the federal goverment. No harm will be visited upon the federal government nor to the environment to permanently enjoin this provision of the Act. On the other side, this provision and the post-mining land use restrictions drastically affect the economy of the Commonwealth of Virginia, making it economically and physically impossible to mine coal, and prevent the state from using its land for agricultural purposes, for construction of airports, schools, hospitals and for other activities. By recognizing these facts and granting relief, the preemptive power of the federal government through the Commerce Clause is recognized and the rights of the Commonwealth of Virginia, as set out in the Tenth Amendment, are preserved.

Secretary's Jurisdictional Statement, pp. 40A-41A.

The district court invalidated an Act of Congress on cost-benefit grounds. The balancing-test approach, wherein the court attempted to second guess the economic wisdom of exercise of the commerce power, was rejected by this court over forty years ago. See Nebbia v. New York, 291 U.S. 502 (1834). The opinion below invoked the Tenth Amendment by casting the cost factor in terms of the federal law's impact on the state's economy, but the analysis was

one of substantive due process nonetheless. If this Court had intended National League of Cities to resurrect that long buried doctrine under the auspices of the Tenth Amendment, it would have so held long ago.

Additionally, the idea that the states can and will adequately enforce federal standards is fundamentally unsound. If the states were left free to regulate potentially harmful economic activities within their borders, there would be a strong and ongoing incentive for the states to promulgate inadequate regulations in order to create a competitive advantage for local industry. On the other hand, when the federal government regulates a potentially harmful aspect of industry under its commerce power, performance standards can be more uniform and the undesirable activities eliminated without putting any states' economy at a disadvantage. This benefit of federal enforcement has long been recognized by this court. See United States v. Darby 312 U.S. 100 (1941).

Removing regulatory inequities between states was a major purpose of the Act. In §101 (g), 30 U.S.C. 1201(g), it is stated that:

> "The Congress finds and declares that... (g) surface mining and reclamation standards are essential in order to insure that competition and interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders."

If the district court's order is allowed to stand, state legislatures will, one by one, be subjected and in all probability succumb, to the pressure of coal operators hungry for competitive advantage, until economic balance is achieved and the nation's coal fields lie devastated without regard to state boundaries.

B. EVEN ASSUMING ARGUENDO THE STANDARD OF REVIEW APPLIED BY THE DISTRICT COURT TO BE APPROPRIATE, IT'S HOLDING IS WRONG BECAUSE THE SECTIONS IN QUESTION ARE NOT AN UNWARRANT- ED BURDEN ON THE STATE'S ECONOMY.

The district court opinion indicated great concern for potential impact of Sections 515(d) and (e) on Virginia's economy.

> The cost of production of coal has increased up to seventy percent (70%). On occasion the economic impracticality of strip mining coal is outweighed by physical realties; equipment may not be available to cover the highwall on a steep slope to restore the original contour. These effects aggregate to undermine the Commonwealth's economy: coal companies have gone out of business, between five hundred and one thousand coal miners have lost their jobs; income from surface mining permits has decreased; the coal-based revenues that the counties rely on to operate have been reduced.

District Court Opinion, January 3, 1980, Secretary's Jurisdictional Statement, pp. 37A-38A.

These conclusions are in direct opposition to the explicit findings of Congress that steep slopes can be surface mined and restored to the approximate original contour without an undue burden being placed on the coal operator. Congress not only concluded that such restoration is physically and economically feasible, but actually found that restoration to approximate original contour is already being accomplished in some Appalachian states. See, H. R. Rep. No. 95-218, 95th Congress, first session, 98-100, 120-124.

Furthermore, the implication in the opinion below that the problems of the state's coal industry are all attributable to Sections 515(d) and (e) of the Act ignores the many other factors behind the slow coal market, such as the slow down in the steel and auto industries, and the difficulties in shipping coal to the European market.

Finally, in those cases where the conclusion of the district court was correct that the steep slope provisions of Section 515(d) and (e) make it impossible for a particular operator to surface mine a particular area, the district court apparently overlooked alternative means of reaching the coal-i.e. use of underground mining technology or contractual arrangement to have the coal surface mined by an operator with the engineering expertise to extract the coal and restore the site in satisfaction of Sections 515(d) and (e). That coal which cannot be mined by either of these alternatives can, without serious harm to the economy of Virginia, remain in the ground until rapidly developing technology

renders extraction feasible without damage to the environment.[2]

II. THE LIMITATION ON MINING METHODS IMPOSED BY SECTIONS 515(d) AND (e) AND 522 DOES NOT WORK SUCH A DIMINUTION IN PROPERTY VALUE AS TO CONSTITUTE A COMPENSIBLE TAKING UNDER THE FIFTH AMENDMENT.

Sections 515(d) and (e), as noted above, require restoration of surface-mined steep slopes to the approximate original contour. Section 522, set out in full in the Secretary's Jurisdictional Statement, pp. 136A-142A, declares certain areas unsuitable for surface mining, including lands within the national parks system, lands within one hundred feet of the outside right-of-way line of any public road, lands within three hundred feet of a school, and other areas. Section 522 also contemplates procedures for designating other lands

[2]Section 102(c), 30 U.S.C. 1202(c), says "It is a pupose of this Act to...(c) assure surface mining operations are not conducted where reclamation as required by this Act is not feasible."

unsuitable for stripping. In other words, on lands affected by Sections 515(d) and (e), coal may be extracted only by surface mining in accordance with law and/or by deep mining. Coal lying under land affected by Section 522 may be deep mined only.

The district court held that these Sections:

> "Effectively prohibit the mining of a person's private property, thereby resulting in a physical property restriction and a nearly complete dimunition in the value of the land, as well as a loss of future profits."

District Court Order, January 3, 1980. Secretary's Jurisdictional Statement, pp. 19A.

Accordingly, the district court held that those provisions impermissibly violated the Fifth Amendment.

The flaw in this rationale is that it fails to consider the possibility of reaching the coal through the underground mining method and belies Congressional findings that the performance standards of §515(d) and (e) are economically and physically feasible. Considering these, it is obvious that the sections in question do not "prohibit the mining of a person's private property;"

they merely require that mining rights be exercised in a manner which, in the judgment of Congress, is not unacceptably destructive of the environment and the rights of surrounding citizens.

Furthermore, the district court's suggestion in its order issued January 3, 1980, Secretary's Jurisdictional Statement, at p. 57A, that the federal government must compensate coal owners in exchange for their adoption of socially acceptable mining and reclamation practices simply does not square with society's acceptance and validation of a wide range of uncompensated land use regulations ranging from traditional nuisance law and zoning ordinances, to extensive federal air and water pollution controls and other environmental laws. Many cases can be cited to illustrate the law's recognition that the use of private property may be legislatively regulated without compensation to serve the public good.

For instance, in Goldblatt v. City of Hempstead 369 U.S. 590 (1962), this Court upheld a city safety ordinance which banned any excavation below the

water table and effectively prohibited an established sand and gravel mining business from continuing operations. This law prevented the most lucrative use of the land and caused severe individual hardship, but was nevertheless held constitutional. The Court found that government regulation to prevent noxious land uses from inflicting injury upon the community is necessary to the existence and safety of organized society. Id. at 593. See also, Transportation Company, et. al. v. City of New York, 438 U.S. 104 (1978), (application of New York City's Landmarks Preservation law, which prevented additions to the historic Penn Central Terminal, did not constitute a taking even though it caused significant diminution in value.) Hadachek v. Sebastian, 239 U.S. 394 (1915), (a City of Los Angeles zoning ordinance prohibiting the establishment or operations of brickyards within described geographical limits, thereby causing a

decrease in the value of plaintiff's property from $800,000.00 to $60,000.00, held not a taking). In declaring Sections 515(d) and (e) and Section 522 unconstitutional under the Takings Clause, the district court relied heavily on Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922). See District Court Opinion, January 3, 1980, Secretary's Jurisdictional Statement, pp. 45A-46A, 50A-51A, 55A, 57A. Pennsylvania Coal Company, an opinion written by Justice Holmes, struck down as an uncompensated taking, a Pennsylvania law prohibiting underground mining in areas where such mining would cause subsidence of surface structures. The district court's reliance on this case is misplaced because the statute involved therein amounted to an absolute prohibition against the mining of coal in the affected areas. Sections 515(d) and (e) and 522 do not work such a prohibition, but rather they merely limit mining methods.

III. THE DISTRICT COURT'S RULING THAT ISSUANCE OF SUMMARY CESSATION ORDERS AND CIVIL PENALTIES UNDER SECTIONS 518, 521, and 525 OF THE ACT OFFENDS PROCEDURAL DUE PROCESS IS NOT CONSISTENT WITH CASE LAW UPHOLDING SUMMARY ADMINISTRATIVE ENFORCEMENT ACTION IN SIMILAR CIRCUMSTANCES.

A. SUMMARY CESSATION ORDERS

Section 521(a)(2), set out in full in the Secretary's Jurisdictional Statement at pp. 132A-133A, authorizes the Secretary to issue an order that mining immediately cease to abate danger to public health or safety or the environment and, if necessary, to immediately take remedial measures. Section 525 set out in the Secretary's Jurisdictional Statement at pp. 142A-145A, provides the mine operator agrieved by an immediate cessation order the opportunity to object to such order at a public hearing and obtain judicial review.

This process is not unusual, nor is it violative of procedural due process. This Court has for years recognized that immediate threats to a significant public interest justify administrative action prior to a hearing. Calero-Toledo v. Pearson Yacht Leasing Company, 416 U.S. 663 (1974), (seizure of a rental yacht carrying marijuana); Ewing v. Mytinger and

Casselberry, Inc., 339 U.S. 594 (1950), (seizure of mislabeled vitamin product); Bowles v. Willingham, 321 U.S. 503 (1944), (rent control orders); Phillips v. Commissioner of Internal Revenue, 283 U.S. 589 (1931), (collection of federal revenue); Central Union Trust Company v. Garvan, 254 U.S. 554 (1921), (seizure of enemy property); North American Cold Storage Company v. Chicago, 211 U.S. 306 (1908), (seizure of contaminated food).

The district court's chief objection to the issuance of summary cessation orders was based upon concern that in the past, such orders have occasionally been erroneously issued. District Court Opinion, January 3, 1980. Secretary's Jurisdictional Statement, pp. 65A-67A, 72A-73A. The objection that a particular administrative procedure has, in the past, been abused, does not invoke the doctrine of procedural due process. As this Court pointed out in Ewing v. Mytinger and Casselberry, Inc., 339 U.S. 594 (1950):

> Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.

339 U.S. at 599.

B. SUMMARY ISSUANCE OF CIVIL PENALTIES

Section 518 of the Act, set out fully in the Secretary's Jurisdictional Statement, pp. 127A-131A, establishes procedures governing the issuance of civil penalties under the Act. The rule regarding hearings is explicit.

> A civil penalty shall not be assesed by the Secretary only after the person charged with the violation... has been given an opportunity for a public hearing.

Section 518(b).

The district court acknowledged the procedural adequacy of this, but, noting that under 518(a), the issuance of a civil penalty is mandatory when the violation leads to a cessation order, concluded that where summary issuance of a cessation order would violate due process the accompanying civil penalty

and therefore the civil penalty would also be a due process violation, and therefore the civil penalty section must fall. District Court Opinion, January 3, 1980, Secretary's Jurisdictional Statement, pp. 67A-69A.

The procedural adequacy of the summarily issued cessation order has already been shown, supra. The civil penalty accompanying such order is likewise valid. Further, the civil penalty provision is legitimate because it does not constitute final action, but a mere preliminary hearing. As Justice White wrote in Arnett v. Kennedy, 416 U.S. 134, 187 (1974) (concurring and dissenting opinion),

> [I]n passing upon claims to a hearing before preliminary but non-final deprivations, the usual rule of this Court has been that a full hearing at some time suffices.

CONCLUSION

The judgment of the district court, insofar as it found Sections 515(d) and (e), 518, 522, and 525 of the Act unconstitutional, should be reversed.

Respectfully submitted,

ROBERT T. COPELAND
Attorney for defendant-intervenors

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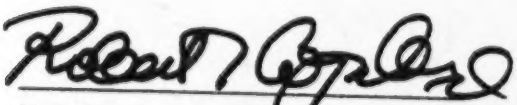

Robert T. Copeland

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF APPELLANT-INTERVENORS

were served on the following persons, who have been represented to me as counsel to be served in said action, by first class mail with proper postage applied and deposited in a mail box of the United States Postal Service:

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AFFIDAVIT

STATE OF VIRGINIA)

) to-wit:

CITY OF RICHMOND)

The foregoing instrument was acknowledged before me this 18th day of November, 1980.

Given under my hand this 18th day of November, 1980.

My commission expires: May 29, 1984.

Pamela A. Brumbaugh

Notary Public